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No. 99-1980

In the Supreme Court of the United States

NEXTWAVE PERSONAL COMMUNICATIONS, INC.,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the bankruptcy court had authority to permit petitioner to retain 63 Federal Communications Commission wireless telecommunications licenses for which it bid $4.74 billion at a public auction, while at the same time avoiding, as a constructive fraudulent transfer, $3.7 billion of that winning bid.

2. Whether the debt petitioner incurred at auction was in whole or in part constructively fraudulent because the debt was incurred for less than reasonably equivalent value.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 200 F.3d 43. The opinion of the district court (Pet. App. 40a-56a) is reported at 241 B.R. 311. The opinions of the bankruptcy court (Pet. App. 57a-161a) are reported at 235 B.R. 263, 235 B.R. 272, 235 B.R. 277, 235 B.R. 305, and 235 B.R. 314.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1999. A petition for rehearing was

denied on February 10, 2000. On May 5, 2000, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including June 9, 2000, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Communications Act of 1934, as amended, establishes a system for licensing the use of the radio spectrum, 47 U.S.C. 301, and vests in the Federal Communications Commission (FCC or Commission) the authority to grant radio licenses where the agency finds that the "public convenience, interest, or necessity will be served thereby." 47 U.S.C. 307(a). Accord 47 U.S.C. 309(a). For many years, the FCC awarded spectrum licenses through comparative hearings. Concerned about the "substantial delays and burdensome costs" associated with the hearing process where multiple applications for the same license were filed, see H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 897 (1981), Congress later amended the statute to authorize the Commission to grant initial licenses to qualified applicants "through the use of a system of random selection," or lottery. 47 U.S.C. 309(i)(1).

The lottery system also proved unsatisfactory, however. Among other things, lotteries were criticized for "encouraging unproductive speculation for spectrum licenses" and failing "to reward persons who have spent money to research and develop a new technology or service." H.R. Rep. No. 111, 103d Cong., 1st Sess. 248 (1993). Accordingly, in 1993 Congress authorized the Commission to grant initial licenses for spectrum dedicated to certain commercial services "through the use of a system of competitive bidding," or auction. 47 U.S.C. 309(j)(1). Congress recognized that a system of

public auctions would eliminate unproductive speculation, because those who do not have an immediate plan to put spectrum to valuable use will generally be unwilling to pay for it. "Because new licenses would be paid for, a competitive bidding system will ensure that spectrum is used more productively and efficiently than if handed out for free." H.R. Rep. No. 111, *supra*, at 249.

Section 309(j) directs the Commission to develop a competitive bidding methodology that, among other things, (1) aids in "the development and rapid deployment of new technologies, products, and services," (2) avoids "excessive concentration of licenses," (3) recovers "a portion of the value of the public spectrum resource made available for commercial use," and (4) promotes "efficient and intensive use of the electromagnetic spectrum." 47 U.S.C. 309(j)(3)(A)-(D). Pursuant to the authority granted by 42 U.S.C. 309(j), the Commission has established a system of simultaneous multiple-round auctions. The Commission concluded that such a system would serve the interests identified by Congress. It explained:

> Since a bidder's abilities to introduce valuable new services and to deploy them quickly, intensively, and efficiently increase the value of a license to a bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services in each area and the efficient and intensive use of the spectrum.

See *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 FCC Rcd 2348, ¶ 71 (1994) (internal quotation marks and footnote omitted).

To ensure the integrity of competitive bidding as a system of license allocation, the FCC's auction rules specify that any license grant is "conditioned upon full and timely payment of the winning bid amount." 47 C.F.R. 24.708(a). In the case of companies that elect to pay for their licenses in installments, the rules provide that any "license granted * * * shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan." 47 C.F.R. 1.2110(f)(4). The Commission's C Block rules further provide that, in the event a high bidder defaults or is disqualified after the close of the auction, the defaulting bidder is liable for "the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission," 47 C.F.R. 1.2104(g)(1) and 24.704(a)(1), plus an additional penalty, 47 C.F.R. 1.2104(g)(2) and 24.704(a)(2). In addition, failure to make timely payment triggers automatic cancellation of the license. 47 C.F.R. 1.2110(f)(4)(iii), (iv).

2. Pursuant to the competitive bidding provision of 47 U.S.C. 309(j), the FCC auctioned 493 "C Block" broadband personal communications services (PCS) licenses in May and July of 1996. Pet. App. 4a-5a.[1] Peti-

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[1] Broadband PCS permits a "new generation of communications devices that will include small, lightweight, multi-function portable phones, portable facsimile and other imaging devices, new types of multi-channel cordless phones, and advanced paging devices with two-way data capabilities." *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 FCC Rcd 5532, ¶ 3 (1994). For bidding purposes, the FCC had divided the spectrum to be used for broadband PCS into six blocks, denominated by the letters "A" through "F." *Id.* ¶ 6. Each of the A and B block licenses covered one of the 51 Major Trading Areas in the United States and its territories, as identified by the Rand-

tioner was declared the high bidder for 63 of those licenses after it submitted winning bids totaling $4.74 billion. Pet. App. 5a. In accordance with the FCC's rules governing the C Block auction, petitioner made payments to bring its total downpayment to five percent of its winning bid, and filed a "long-form" license application containing the information necessary for the FCC to determine that it satisfied all applicable statutory and regulatory qualifications. *Id.* at 6a. See 47 C.F.R. 24.709, 24.711(a)(2).[2]

The actual grant of the licenses was delayed, however, while the FCC considered claims that petitioner was ineligible because, among other things, its percentage of foreign ownership exceeded regulatory limits. Pet. App. 6a. On January 3, 1997, the licenses were granted to petitioner, after petitioner submitted a

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McNally Commercial Atlas & Marketing Guide; each of the C, D, E, and F block licenses covered one of the 493 Basic Trading Areas identified by the same Guide. *Ibid.* The A, B, and C block licenses covered 30 MHz of spectrum each; the D, E, and F block licenses covered 10 MHz of spectrum each. *Ibid.*

[2] In accordance with the statute's mandate to the FCC to avoid "excessive concentration of licenses" and promote the dissemination of licenses "among a wide variety of applicants," 47 U.S.C. 309(j)(3)(B); see also 47 U.S.C. 309(j)(4)(C) and (D), the C-Block auction was open only to applicants with less than $125 million in gross revenues during the previous two years, and assets totaling less than $500 million at the time of the auction. 47 C.F.R. 24.709(a)(1) (1996). Applicants eligible for the C Block auction were required to pay only 10 percent of their winning bid in cash by the time of the license grant, 47 C.F.R. 24.711(a)(2), with the remaining balance paid in installments over the ten-year license term at below-market rates. See 47 C.F.R. 24.711(b). For an applicant—such as petitioner—that qualified as a "small business," the interest rate was the rate for ten-year U.S. Treasury obligations on the day the license was granted, with interest-only payments for the first six years. 47 C.F.R. 24.711(b)(3).

plan to bring its capital structure into compliance with applicable requirements. *In re Applications of NextWave Personal Communications, Inc. for Various C-Block Broadband PCS Licenses*, 12 FCC Rcd 2030, ¶¶ 8-9 (1997). Upon the license grant, petitioner deposited funds sufficient to bring its downpayment up to 10 percent of its winning bids. Pet. App. 6a. See 47 C.F.R. 24.711(a)(2). On February 19, 1997, petitioner executed promissory notes for the remaining 90 percent of its bid. Pet. App. 6a.

3. In the meantime, many C Block licenseholders encountered difficulty obtaining the financing necessary to pay for their bids and fund their business operations, and several jointly requested the FCC to modify their installment payment obligations. In response, the FCC on March 31, 1997 suspended installment payments on the C Block licenses and instituted a proceeding to consider whether and to what extent to restructure the obligations of the C Block licensees. *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 12 FCC Rcd 16436, ¶¶ 14-17 (1997). The FCC ultimately adopted several options designed to assist C Block licensees in restructuring their obligations, including allowing licensees to return all or a specified portion of the spectrum acquired for re-auction, as well as to use a portion of their downpayments to prepay some licenses in full. *Id.* ¶ 6.

In issuing its restructuring decision, the FCC decided against adopting proposals that would "result in a dramatic forgiveness of the debt owed." 12 FCC Rcd 16436, ¶ 19. The agency explained that to do so would not only "be very unfair to other bidders," but would also "gravely undermine the credibility and integrity of

[its] rules." *Ibid.*[3] The Commission ultimately gave licensees until June 8, 1998 to elect whether to avail themselves of the options for restructuring their obligations, or to continue with their original installment plans, and until July 31, 1998 to resume payments. *Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Service (PCS) Licensees*, 14 FCC Rcd 6571, ¶ 3 (1999).

4. Petitioner unsuccessfully sought to obtain a stay of the election deadline from the FCC, see *Petition of NextWave Telecom, Inc. for a Stay of the June 8, 1998, Personal Communications Services C Block Election Date*, 13 FCC Rcd 11880 (1998), and from the D.C. Circuit, see *NextWave Telecom, Inc.* v. *FCC*, No. 98-1255 (June 5, 1998). On June 8, 1998, petitioner filed for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. At the same time, the company commenced an adversary proceeding against the FCC to avoid its $4.7 billion obligation as a constructive fraudulent conveyance under 11 U.S.C. 544(b). Pet. App. 9a.[4]

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[3] See *Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees*, 13 FCC Rcd 8345, ¶ 29 (1998) ("Retroactively changing the payment terms would be unfair to other applicants that might have bid differently under more relaxed payment terms.").

[4] Petitioner also contended that the FCC's conduct required that its claims be equitably subordinated, but the bankruptcy court dismissed that claim for lack of jurisdiction, on the ground that petitioner's allegations concerned "conduct of the FCC in its regulatory capacity," and that it did "not have jurisdiction to adjudicate the propriety of and attach legal consequences to the

The bankruptcy court held that $3.7 billion of petitioner's debt should be avoided as a constructive fraudulent conveyance, and that the FCC was not entitled to reclaim the licenses. See Pet. App. 57a-161a. In doing so, the court reduced the amount that petitioner was required to pay for the C Block licenses from the $4.74 billion petitioner had originally bid, to a little less than $1.023 billion, while at the same time allowing petitioner to retain the licenses during its reorganization in bankruptcy. See *id.* at 115a. The district court affirmed. *Id.* at 40a-56a.

4. The court of appeals reversed and remanded the case for further proceedings. Pet. App. 1a-39a. The court held that the bankruptcy court "had no authority * * * to interfere with the FCC's system for allocating spectrum licenses, and that in any event it wrongly concluded that the [l]icenses were fraudulently conveyed." *Id.* at 4a. The appeals court ruled that because the FCC, and not the courts, was vested by the Communications Act with the power to grant and condition licenses for the use of the radio spectrum, it is "beyond the jurisdiction of a court in a collateral proceeding to mandate that a licensee be allowed to keep its license despite its failure to meet the conditions to which the license is subject." *Id.* at 21a.

As the court explained, "[t]he FCC had not sold NextWave something that the FCC had owned; it had used the willingness and ability of NextWave to pay more than its competitors as the basis on which it

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conduct of the FCC or other regulatory agencies acting within the scope of the powers conferred on them by Congress." Pet. App. 160a. Petitioner did not appeal that ruling to the district court, *id.* at 43a, and the claim was therefore not before the court of appeals, *id.* at 9a.

decided to grant the [l]icenses to NextWave." Pet. App. 21a-22a. Thus, "NextWave's inability to follow through on its financial undertakings had more than financial implications." *Ibid.* Instead, "[i]t indicated that under the predictive mechanism created by Congress to guide the FCC, NextWave was not the applicant most likely to use the [l]icenses efficiently for the benefit of the public in whose interest they were granted." *Ibid.* In other words, "[b]y holding that for a price of $1.023 billion NextWave would retain licenses for which it had bid $4.74 billion, the bankruptcy and district courts impaired the FCC's method for selecting licensees by effectively awarding the [l]icenses to an entity that the FCC determined was not entitled to them." *Id.* at 23a.

The court of appeals also held that "the transaction in which the [l]icenses were issued was * * * not constructively fraudulent." Pet. App. 25a. The court noted that a transfer or obligation is a fraudulent conveyance only "if the debtor received less than a reasonably equivalent value in exchange for such transfer or obligation." *Ibid.* (internal quotation marks and citations omitted). Relying on the FCC's rules, the court held that "the close of the auction" marked the time at which NextWave became obligated to pay its bid price. *Id.* at 29a-30a. At that time, the court stated, the value of the licenses was "by definition * * * $4.74 billion, since 'the fair market values of the C block licenses were equivalent to the bids accepted by the FCC at the close of the auction and reauction.'" *Id.* at 26a (citation omitted). And because the "fair market

value was $4.74 billion * * * there was no constructive fraud." *Ibid.*[5]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decision of any other court of appeals or of this Court. Further review therefore is not warranted.

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[5] On December 16, 1999, after the court of appeals had announced its decision but before it had issued its opinion, see Pet. App. 3a, petitioner filed modifications to its Plan of Reorganization providing that it would pay the FCC for the licenses in full. See *In re NextWave Personal Communications, Inc.*, 244 B.R. 253, 262 (Bankr. S.D.N.Y. 2000); see also Pet. 7 n.2. On January 12, 2000, the FCC filed objections to petitioner's modified reorganization plan, explaining that petitioner's licenses had automatically lapsed for nonpayment. 244 B.R. at 262-263. The same day the agency issued a Public Notice setting the licenses previously held by petitioner for reauction. *Id.* at 262. The bankruptcy court held the FCC's Public Notice "null, void, and without force and effect" and in violation of the Bankruptcy Code's automatic stay. *In re NextWave Personal Communications, Inc.*, No. 98 B 21529 (ASH) (Bankr. S.D.N.Y. Feb. 7, 2000). On the FCC's petition, the court of appeals granted a writ of mandamus directing the bankruptcy court to vacate its order, concluding that the FCC's decision to hold petitioner to timely as well as full payment was an exercise of its regulatory authority which was beyond the power of the bankruptcy court to modify. *In re FCC*, 217 F.3d 125, 131 (2d Cir. 2000). In addition, petitioner filed a petition for review and a notice of appeal of the FCC's Public Notice in the D.C. Circuit, see *NextWave Personal Communications, Inc.* v. *FCC*, Nos. 00-1045, 00-1046. On June 23, 2000, the court of appeals dismissed those suits as premature because petitioner had a petition for reconsideration pending before the Commission, and on August 3, 2000, the court denied petitioner's petition for panel rehearing. On September 6, 2000, the FCC announced its decision denying petitioner's request for reconsideration.

1. Under the Communications Act of 1934, the FCC is vested with the power to grant telecommunications licenses if the "public convenience, interest, or necessity will be served thereby." 47 U.S.C. 307(a); see also 47 U.S.C. 309(a). Under the statute, the Commission "serve[s] as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication,'" *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 168 (1968), and is "the expert body which Congress has charged to carry out its legislative policy." *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940). Thus, as this Court has recognized, "it is the Commission, not the courts, which must be satisfied that the public interest will be served" in the grant of a license, *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946), and "no court can grant an applicant an authorization which the Commission has refused." *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 14 (1942).

Section 309(j) of the Act authorizes the Commission to allocate licenses for use of the electromagnetic spectrum "through the use of a system of competitive bidding." 47 U.S.C. 309(j)(1). In promulgating the ground rules for such competitive bidding, the FCC proceeded on the premise—shared by Congress—that a system of auctions would ensure that spectrum is granted to the most efficient and effective user. See *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 FCC Rcd 2348, ¶ 71 (1994) (because "a bidder's abilities to introduce valuable new services and to deploy them quickly, intensively, and efficiently increase the value of a license to a bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid de-

ployment of new services in each area and the efficient and intensive use of the spectrum."); *id.* at ¶ 70 ("auction designs that award licenses to the parties that value them most highly will best achieve" the statutory goals); H.R. Rep. No. 111, 103d Cong., 1st Sess., 249 (1993) (auctions will "ensure that spectrum is used more productively and efficiently than if handed out for free.").

The FCC's C Block auction payment rules are an integral part of that allocative mechanism. Under those rules, all licenses are "conditioned upon full and timely payment of the winning bid amount," 47 C.F.R. 24.708(a), or "full and timely performance of the licensee's payment obligations" under any "installment plan," 47 C.F.R. 1.2110(f)(4). The Commission's rules further provide that, in the event a high bidder defaults or is disqualified after the close of the auction, the defaulting bidder is subject to a penalty equal to "the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission," 47 C.F.R. 1.2104(g)(1) and 24.704(a)(1), plus an additional penalty, 47 C.F.R. 1.2104(g)(2) and 24.704(a)(2).[6] Absent such rules, bidders could submit bids that exceed their expected return on the spectrum—thereby obtaining spectrum that other users value more highly than they do—with impunity, undermining the Commission's allocative mechanism.

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[6] The additional penalty is "3 percent of the subsequent winning bid," unless the "subsequent winning bid exceeds the defaulting bidder's bid amount," in which case "the 3 percent payment will be calculated based on the defaulting bidder's bid amount." 47 C.F.R. 1.2104(g)(2).

As a result, the bankruptcy court's decision to permit petitioner to retain 63 PCS licenses for a small fraction of what it had bid "had more than financial implications," Pet. App. 22a; it overturned the agency's licensing decisions. Indeed, under the agency's allocation system, petitioner's entitlement to the licenses depended upon its willingness to pay more for them than the other participants in the C Block auction. That entitlement disappears if petitioner is unwilling to stand behind its winning bid. As the court of appeals explained, "NextWave's inability to follow through on its financial undertakings * * * indicated that under the predictive mechanism created by Congress to guide the FCC, NextWave was not the applicant most likely to use the [l]icenses efficiently for the benefit of the public in whose interest they were granted." *Ibid.* "By holding that for a price of $1.023 billion NextWave would retain licenses for which it had bid $4.74 billion," the bankruptcy and district courts "effectively award[ed]" C Block licenses "to an entity that the FCC determined was not entitled to them" and thereby impermissibly "exercised the FCC's radio-licensing function." *Id.* at 23a. "It is beyond the jurisdiction of a court in a collateral proceeding," the appeals court correctly concluded, "to mandate that a licensee be allowed to keep its license despite its failure to meet the conditions to which the license is subject." *Id.* at 21a.

This is not to say, however, that the bankruptcy and district courts "lacked jurisdiction over every aspect of the relationship between the FCC and NextWave." Pet. App. 23a. The court of appeals made clear that "[t]o the extent that the financial transactions between the two do not touch upon the FCC's regulatory authority, they are indeed like the obligations between ordinary debtors and creditors." *Id.* at 23a-24a. Thus,

"[i]f the [l]icenses are returned to the FCC, the bankruptcy court may resolve resulting financial claims that the FCC has against NextWave as it would the claims of any government agency seeking to recover a regulatory penalty or an obligation on a debt." *Id.* at 25a. But what petitioner cannot do is "collaterally attack or impair in the bankruptcy courts the license allocation scheme developed by the FCC." *Id.* at 24a.

2. Contrary to petitioner's contention (Pet. 8-12), the court of appeals' decision is not inconsistent with 28 U.S.C. 1334(b). That statute vests the district courts (and, by reference, the bankruptcy courts) with "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11"—"[n]otwithstanding any Act of Congress that confers exclusive jurisdiction *on a court or courts other than the district courts.*" 28 U.S.C. 1334(b) (emphasis added). As the text of the statute indicates—and as this Court has recognized—"Section 1334(b) concerns the allocation of jurisdiction between bankruptcy courts and other '*courts*,' and, of course, an administrative agency * * * is not a 'court.'" *Board of Governors* v. *MCorp Financial, Inc.*, 502 U.S. 32, 41-42 (1991). Accord 1 *Collier on Bankruptcy* ¶ 3.01[4][a], at 3-17 (15th ed. 2000) (Section 1334(b) "applie[s] solely to jurisdictional confrontations between courts, not between the district court and an administrative agency").[7] In this case, the bankruptcy

[7] As this Court has recognized, a reading of the Bankruptcy Code that "would require bankruptcy courts to scrutinize the validity of every administrative or enforcement action brought against a bankrupt entity" is "problematic, both because it conflicts with the broad discretion Congress has expressly granted many administrative entities and because it is inconsistent with the limited authority Congress has vested in bankruptcy courts."

court did not merely assert jurisdiction vested in another court, see 28 U.S.C. 2342 and 47 U.S.C. 402 (vesting jurisdiction to review FCC orders in the courts of appeals), but invaded the powers Congress has conferred exclusively on the FCC to grant radio licenses. Indeed, the district court decided not only the price of the licenses, but to whom they would be granted.

For the same reasons, there is no conflict between the decision below and the Section 1334(b) decisions cited by petitioner. See Pet. 8-12. The Fifth Circuit's unpublished denial of a stay pending appeal in the litigation over the C Block licenses granted to GWI and its subsidiaries, see *In re United States*, No. 98-11123 (Oct. 7, 1998), cited Pet. 11-12, did not resolve the merits of the government's appeals, which are currently pending. See *United States* v. *GWI PCS 1, Inc.*, No. 99-11294 (5th Cir.) (oral arg. Feb. 3, 2000). The other appeals court decisions upon which petitioner relies all deal with court, not agency, jurisdiction. See Pet. 8-12. Thus, *Quality Tooling, Inc.* v. *United States*, 47 F.3d 1569 (Fed. Cir. 1995), cited Pet. 10, involved whether the bankruptcy court, rather than the Court of Federal Claims, could hear a government contracts dispute; and *Brock* v. *Morysville Body Works, Inc.*, 829 F.2d 383 (3d Cir. 1987), cited Pet. 10-11, concerned whether the bankruptcy court, rather than the court of appeals, could enforce an order by the Occupational Safety and Health Administration to abate health and

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MCorp, 502 U.S. at 40. In this case, because it is the FCC, not the bankruptcy or district court, "that has been entrusted by Congress with authority" to allocate radio licenses, "wise administration * * * demands that the bankruptcy court accommodate itself to the administrative process." *Nathanson* v. *National Labor Relations Board*, 344 U.S. 25, 30 (1952).

safety violations. *In re Town and Country Home Nursing Servs., Inc.*, 963 F.2d 1146, 1155 (9th Cir. 1991), and *In re University Medical Center*, 973 F.2d 1065, 1073-1074 (3d Cir. 1992), cited Pet. 11, both of which involved the issue of exhaustion of administrative remedies for claims asserted under the Medicare Act, are even further afield.

Nor was the bankruptcy court vested with jurisdiction over petitioner's fraudulent conveyance claim by virtue of 28 U.S.C. 1334(e). See Pet. 12. n.6. That Section provides the district courts (and again, the bankruptcy courts by reference) with jurisdiction over "all of the * * * *property* of the estate." 28 U.S.C. 1334(e) (emphasis added). But spectrum licenses are not property, much less property of the estate. As this Court has long recognized, "[t]he policy of the [Communications] Act is clear that no person is to have anything in the nature of a property right as the result of the granting of a license." *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940). The statute "provide[s] for the use of [radio] channels, but not the ownership thereof," and states expressly that "no [radio] license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. 301. When Congress authorized a system of competitive bidding, it made clear that the same rule would apply: Nothing in Section 309(j), Congress specified, shall "diminish the authority of the Commission under the other provisions of this chapter to regulate or reclaim spectrum licenses," or "be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the same service that were not issued pursuant to this subsection." 47 U.S.C. 309(j)(6). In short, "[l]icenses to broadcast do not con-

fer ownership of designated frequencies, but only the temporary privilege of using them." *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 394 (1969).

Thus, although petitioner points to several cases that, in its view, "hold[] or assum[e]" that FCC licenses are property of the estate, Pet. 12 n.6, none of those decisions suggests that the bankruptcy court thereby acquires the power to interfere with the FCC's license-granting function. While petitioner cites *In re Tak Communications, Inc.*, 985 F.2d 916, 917-919 (7th Cir. 1993), see Pet. 12 n.6, in that case the court of appeals refused to allow a security interest in a broadcast license, emphasizing that "[w]hether to permit such interests is * * * a matter for the FCC rather than the courts to decide." *Id.* at 919. And in both *In re Central Arkansas Broad. Co.*, 68 F.3d 213, 214-215 (8th Cir. 1995), and *In re Atlantic Bus. & Community Dev. Corp.*, 994 F.2d 1069, 1071 (3d Cir. 1993), cited Pet. 12 n.6, the licenses at issue had been transferred with FCC approval, and thus the FCC's regulatory interests were no longer at issue.[8]

Finally, petitioner contends that the decision below conflicts with decisions holding that a governmental entity submits to the jurisdiction of the bankruptcy

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[8] The Commission has a policy against a licensee's giving a security interest in a broadcast license, see *In re Merkley*, 94 FCC.2d 829 (1983), since foreclosure on such an interest might result in an impermissible license transfer without FCC approval. *In re Cheskey*, 9 FCC Rcd 986 ¶ 8 (1994). By contrast, the Commission permits the granting of a security interest in the *proceeds* of the sale of a license. *Id.* ¶ 7. As the Commission has explained, such a security interest gives the creditor "no rights over the license itself, nor can it take any action under its security interest until there has been a transfer which yields proceeds subject to the security interest." *Id.* ¶ 9.

court by filing a claim in a bankruptcy case. Pet. 14 n.7. The fact that a federal agency is a claimant in a bankruptcy proceeding may permit the court to address the agency's claim—*i.e.*, its demand for money from the estate—as the court of appeals recognized. Pet. App. 23a-24a. But it cannot vest the bankruptcy court with the power to exercise the agency's federal administrative and regulatory authority over the issuance and allocation of spectrum licenses. Since that is the power the bankruptcy court attempted to exercise in this case—barring the FCC from withdrawing the spectrum licenses or otherwise allocating them to another user—the court of appeals' decision was undoubtedly correct.[9]

3. The court of appeals also correctly held that the transaction by which the licenses were acquired was not a fraudulent conveyance subject to avoidance under the Bankruptcy Code. Under Section 544(b) of the Bankruptcy Code, a debtor may avoid "any transfer of

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[9] Even if one were to assume, *arguendo*, that the bankruptcy court could exercise jurisdiction equivalent to that vested in the D.C. Circuit under the Hobbs Act, 28 U.S.C. 2342, and the Communications Act, 47 U.S.C. 402, such review would be limited to the deferential, on-the-agency-record, Administrative Procedures Act review conducted under those Acts. It would not permit the bankruptcy court to decide that the FCC must permit petitioner to retain its license, or to conduct a trial to determine the price, which is what the bankruptcy court did here. See also note 7, *supra*. Moreover, because even the D.C. Circuit did not have jurisdiction over NextWave's challenge to the FCC's orders at the time the bankruptcy court acted—the D.C. Circuit dismissed the petition for review as jurisdictionally premature—there was no basis for any allegedly corresponding jurisdiction in the bankruptcy court. *NextWave* v. *FCC*, No. 98-1255 (D.C. Cir. June 11, 1998).

an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law." 11 U.S.C. 544(b). The Section incorporates state fraudulent conveyance law, which, as applicable here, defines a transfer or obligation as fraudulent if it was made or incurred "without receiving a reasonably equivalent value." See, *e.g.*, Cal. Civ. Code Ann. § 3439.04 (West 1997). See also D.C. Code Ann. § 28-3105 (1981) ("without receiving a reasonably equivalent value"); N.Y. Debt. & Cred. Law Ann. § 273 (McKinney 1990) ("without a fair consideration").[10] The district court determined, and the court of appeals agreed, that reasonably equivalent value is determined by the "value of the consideration exchanged between the parties at the time of the conveyance or incurrence of the debt which is challenged." Pet. App. 85a. Accord *id.* at 26a.

The appeals court properly determined that petitioner became obligated, at the close of the C Block auction, "to assure payment of $4.74 billion [it had bid] for the [l]icenses[,] either by cash and credit on delivery or by submitting to liability for the shortfall if [petitioner]—which knew the rules for qualification—failed to qualify." Pet. App. 27a-28a. It is undisputed that the fair market value of the licenses at the close of the auction was the amount petitioner had bid for them. *Id.* at 99a n.9. Petitioner by definition thus received "reasonably equivalent"—indeed identical—value for its obligation, and there could be no constructive fraud.

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[10] The district court held that, because the potentially applicable state fraudulent conveyance statutes were essentially the same, a choice of law analysis was unnecessary; "the fundamental legal principles would not change under any possible choice of law." Pet. App. 81a-82a. The court of appeals agreed. *Id.* at 25a.

Id. at 26a; see also *id.* at 11a ("the transfer could not be constructively fraudulent because NextWave paid exactly the market price for the [l]icenses as of that date, as determined by its own bid").

a. The court of appeals' conclusion that petitioner's obligation arose at the close of the auction is supported by the FCC's interpretation of its own rules. Under 47 C.F.R. 1.2109(c), any "winning bidder who is found unqualified to be a licensee, fails to remit the balance of its winning bid in a timely manner, or defaults or is disqualified for any reason after having made the required down payment" is required to pay the FCC "the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission," plus "3 percent of the subsequent winning bid." 47 C.F.R. 1.2104(g).[11] Relying on that provision, the FCC has formally interpreted its auction rules to provide that a "licensee's binding obligations to repay the original bid price for the licenses" is "incurred upon acceptance of the high bid." *In re Applications for Assignment of Broadband Personal Communications Services Licenses*, 14 FCC Rcd 1126, ¶ 1 (1998).[12] It is well settled that an agency's

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[11] The rules provide that "[i]f the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent payment will be calculated based on the defaulting bidder's bid amount." 47 C.F.R. 1.2104(g)(2).

[12] See also *Auction of C, D, E, and F Block Broadband PCS Licenses*, 13 FCC Rcd 24540, ¶ 4 (1998) ("Under the Commission's rules, [the winning bidder] became obligated for its winning bid amounts when the auction closed."); *In the Matter of C.H. PCS, Inc.*, 14 FCC Rcd 4131, ¶ 3 (1999) (under FCC auction rules, default payment "is equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission" precisely "[b]ecause, under the

interpretation of its own regulations "must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation," *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (internal quotation marks and citations omitted), particularly where, as here, the regulation concerns "a complex and highly technical regulatory program," *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991).

In this case, the FCC's interpretation is an entirely natural reading of its rules. The FCC's rules provide that a defaulting winning bidder is liable for the full amount of its bid, less any amount that the agency recovers in a subsequent auction, plus a 3 percent penalty. 47 C.F.R. 1.2109(c), 1.2104(g)(2). Because the rules calculate the bidder's potential liability on the basis of "any shortfall between the subsequent winning bid and its own," they "are fully consistent with the notion that the winning bidder becomes liable for full price of the winning bid upon the close of the auction." Pet. App. 30a.[13]

Commission's rules, a winning bidder is obligated to pay the full amount of its winning bid").

[13] Petitioner contends the FCC's rules do not "obligate[] the bidder to pay the full amount of the bid" upon default. Pet. 29. But that is only because the FCC has undertaken to mitigate the damages resulting from a bidder's default by re-auctioning the license. Under the agency's rules, in the (admittedly unlikely) event that the agency recovered nothing upon re-auction—*i.e.*, it was unable to mitigate—the bidder would be required to pay the full amount of its bid. 47 C.F.R. 1.2104(g)(2). The fact that liability for default on a bidder's obligation may be reduced or mitigated by subsequent resale of the licenses does not change the nature of the obligation itself, nor the time at which it attaches. Indeed, if an individual validly contracts to purchase a good, he can hardly argue that the contract did not obligate him to pay for it simply because the seller is required to mitigate damages by reselling the

That result, moreover, is consistent with general principles of auction law, as well as with the underlying necessities of the C Block auction process. Under general auction principles, the close of the auction, signified by the fall of the hammer, is usually the point at which the bidder's offer is deemed accepted by the seller, and an enforceable contract is created. *Blossom* v. *Railroad*, 70 U.S. (3 Wall.) 196, 206 (1865). Only where the auction is conducted "with reserve," that is, where the seller retains the right to refuse any offer made, is a contract not formed until the seller formally accepts the bid. 7 Am. Jur.2d *Auctions and Auctioneering* § 20 (1997). In this case, the C Block auctions were not auctions "with reserve," because the FCC did not retain the authority to reject winning bids at its discretion. On the contrary, the Commission's rules state that so long as the agency "determines that * * * [a]n applicant is qualified * * * it *will* grant" the winning bidder's application. 47 C.F.R. 1.2108(d) (emphasis

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good in the event of breach. For the same reason, petitioner cannot argue that the FCC's self-imposed duty of mitigation prevented its obligation to pay from attaching when it won the auctions here. In that respect, the FCC's rules merely follow standard auction and contract law principles. After the court of appeals decided this case, the FCC clarified that slightly different rules apply in the case of bidders who actually become licensees and then default *after* receiving their licenses. Defaulting licensees, unlike defaulting bidders, are not liable for the 3 percent penalty, but (also unlike defaulting bidders) are liable for the full amount they owe, without any mitigation based on the amount the FCC obtains when the licenses are re-auctioned. See *Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures*, FCC No. 00-274, ¶¶ 38-39 (2000). That clarification, however, does not affect the issues petitioner raises, which turn on what petitioner's payment obligations were at the close of the auction but before the licenses were granted.

added). See *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 FCC Rcd 5532, ¶ 81 (1994) ("If the Commission denies all petitions to deny, and is otherwise satisfied that the applicant is qualified, the license(s) *will be granted* to the auction winner.") (emphasis added). In short, by "naming NextWave the winning bidder," the agency became obligated "to deliver the [l]icenses to NextWave, at the price determined by NextWave's winning bid, if NextWave fit certain noneconomic qualifying criteria." Pet. App. 36a.[14]

The core function of the FCC's spectrum auction process firmly supports the conclusion that petitioner's obligations arose at the close of the C Block auction. The auction process is capable of advancing the congressional goals of fairly and efficiently allocating spectrum licenses "only if the bids constitute a reliable

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[14] Clearly, it would be impractical to require the Commission to investigate and determine the qualifications of every bidder that proposes participating in an auction. For that reason, the FCC requires all proposed bidders to complete only a short-form application and certification of eligibility prior to auction, on the understanding that the license will be awarded to the highest bidder so long as that bidder is qualified, as it certified before the auction. See 9 FCC Rcd 2348, ¶¶ 161-166. The fact that the Commission was empowered to reject high bids if the winning bidders were not statutorily qualified to hold a license did not vest the Commission with a general mandate to reject winning bids as a matter of discretion, or otherwise convert the C Block auction into an auction with reserve. Moreover, as the court of appeals pointed out, petitioner's "willingness to bid notwithstanding the undisputed fact that noncompliance [with statutory requirements] would prevent delivery of the [l]icenses and compel NextWave to insure the government against a lower high bid at re-auction demonstrates that NextWave assumed the risk of its own noncompliance." Pet. App. 37a.

index of the bidders' commitments to exploit and make the most of the license at issue." Pet. App. 33a. The high bid must therefore "entail[] the obligation to make good the amount bid, either by a qualified bidder's payment on delivery or by payment of any shortfall (upon re-auction) by a bidder who fails to qualify." *Ibid.* The auction plainly would fail to serve its purpose of allocating licenses to those who value them most highly "[i]f the transaction can be adjusted in bankruptcy proceedings so that the high bidder takes the license without paying the amount of the high bid." *Ibid.* In the end, the court of appeals correctly understood what the bankruptcy and district courts in this case did not: Making certain that the high bidder stands behind its winning bid is critical to ensuring that the congressional goals underlying the FCC's spectrum auction process are achieved.[15]

b. For those reasons, petitioner's complaint that the appeals court's decision conflicts with cases holding that an agency is not entitled to deference "in interpreting its own contracts," Pet. 21, is without merit. The interpretation at issue in this case was not simply an interpretation of petitioner's contract with the government; it was, at bottom, a construction of the regulatory scheme for the allocation of spectrum licenses by

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[15] Petitioner is incorrect to assert (Pet. 16) that, under the court of appeals' holding, agency rules and decisions are "immunized from bankruptcy court jurisdiction" whenever the "agency * * * characterizes its decision as relating to its 'regulatory function.'" Under the court of appeals' decision, the bankruptcy court did have jurisdiction to determine whether the FCC's auction rules and decisions were "regulatory." The court of appeals merely—and correctly—disagreed with the bankruptcy court's resolution of that issue. See Pet. App. 13a-21a. See also pp. 11-14, 23-24, *supra* (explaining regulatory role of auction rules in license allocation process).

auction, the administration of which has been entrusted by Congress to the FCC. Nor is the agency's interpretation undeserving of deference as a mere "litigating position[]." Pet. 26. See *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213 (1988). The FCC's interpretation is embodied in its formal rulings, and there is no basis for suggesting that its reading of its rules "does not reflect the agency's fair and considered judgment on the matter in question." *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997).

In any event, it is far from clear that this case properly presents the deference issue that petitioner raises. Simply put, the agency's and the court of appeals' construction of the auction rules is much more persuasive than the bankruptcy court's, even if one sets the issue of deference aside. Because review of the deference issue raised by petitioner would not alter the judgment of the court of appeals, further review is unwarranted. See *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956) (Court "reviews judgments, not statements in opinions"); *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (courts do not "decide questions that cannot affect the rights of litigants in the case before them") (internal quotations omitted).

Indeed, further review is particularly inappropriate because petitioner could not show a fraudulent conveyance—and therefore would not be entitled relief—*even if* petitioner were correct that it first became obligated to pay for the licenses when it received them, and not when it submitted its winning bids. As the bankruptcy court pointed out (and petitioner does not dispute), petitioner incurred a "potential default liability" by submitting the winning bids. Pet. App. 143a. In particular, under the FCC's rules, petitioner became potentially liable, in the event of default,

for the difference between the amount of its winning bid and the amount of the winning bid at a re-auction of those licenses, *plus* 3 percent of the winning bid at re-auction. 47 C.F.R. 1.2109(c), 1.2104(g)(2).

As a result, when petitioner declined to default on its bid and gave the FCC a promissory note in exchange for its licenses, it received *two* things. First, it received licenses that, according to the bankruptcy court, had by then declined in value to $1.023 billion. But it also *avoided* a liability for the difference between its winning bid amount, and the amount the licenses would have fetched at re-auction, plus three percent of the re-auction price. If one assumes that the licenses would have been re-auctioned for what the bankruptcy court estimated to be their fair market value, that would have been a liability of over $3.7 billion (petitioner's bid of $4.7 billion, less the $1.023 billion re-auction price, plus 3.0% of $1.023 billion re-auction price, or $0.03 billion). By any calculation, a promise to pay $4.7 billion to obtain $1.023 billion in value and avoid over $3.7 billion in liability is reasonably equivalent value.[16]

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[16] The bankruptcy court rejected that argument on the grounds that "[n]o penalty was ever calculated" or "was ever applicable" because petitioner "did not default and its application was not denied." Pet. App. 91a. That is misconceived. Under the Bankruptcy Code, antecedent debts include the "'right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.'" *In re United Energy Corp.*, 944 F.2d 589, 595 (9th Cir. 1991) (quoting 11 U.S.C. 101(5)(A)). In February 1997, petitioner's "potential default liability" was an antecedent debt to the FCC. Having satisfied this antecedent debt dollar-for-dollar, petitioner received reasonably equivalent value for its total payment in cash and promissory notes. See *id.* at 595 (finding exchange of reasonably equivalent value where investors' inchoate rights to restitution were pro-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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portionately reduced by payments received from debtor). The rules governing the analogous area of executory contracts support the same result. See 11 U.S.C. 365.